

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES M. MALARIK,)	
)	Civil Action No. 07 - 1500
Plaintiff,)	
)	Chief District Judge Donetta W. Ambrose
v.)	
)	
OFFICE OF DISTRICT ATTORNEY OF)	
BEAVER COUNTY; ANTHONY J.)	
BEROSH, <i>Assistant District Attorney or</i>)	
ADA; and KEVIN A. KINDRED, <i>Assistant</i>)	
<i>District Attorney or ADA,</i>)	
)	
Defendants.		

MEMORANDUM ORDER

The above captioned case was initiated by the filing of a Motion to Proceed *In Forma Pauperis* (doc. no. 1) on November 6, 2007, and was referred to United States Magistrate Judge Lisa Pupo Lenihan for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges.

Magistrate Judge Lisa Pupo Lenihan filed a Report and Recommendation on December 20, 2007 (doc. no. 7) recommending that the Complaint be dismissed with prejudice in accordance with the directives of the Prison Litigation Reform Act under 28 U.S.C. § 1915A and 28 U.S.C. § 1915(e)(2)(B) based on the Defendants' absolute immunity. Plaintiff filed Objections to the Report and Recommendation on December 27, 2007 and December 28, 2007 (doc. nos. 8 & 9). Plaintiff's Objections do not undermine the recommendation of the Magistrate Judge.

In this regard, a complaint must be dismissed pursuant to Fed. R. Civ. P. 12 (b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (May 21, 2007) (rejecting the traditional 12 (b)(6) standard

set forth in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court must accept as true all allegations of the Complaint and all reasonable factual inferences must be viewed in the light most favorable to plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). The Court, however, need not accept inferences drawn by plaintiff if they are unsupported by the facts as set forth in the complaint. See California Pub. Employee Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997)). Nor must the court accept legal conclusions set forth as factual allegations. Bell Atlantic Corp., 127 S. Ct. at 1965 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp., 127 S.Ct. at 1965. Although the United States Supreme Court does "not require heightened fact pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

Here, Plaintiff's Complaint does set forth any facts upon which to support a claim for malicious, vindictive or selective prosecution. Accord Waite v. Beaver County, 2007 WL 878525, *1 (W.D.Pa. March 21, 2007). Consequently, after *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation, and the Objections thereto, the following order is entered:

AND NOW, this 16th day of January, 2008;

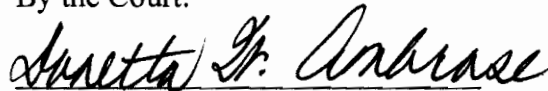
IT IS HEREBY ORDERED that that the Complaint is **DISMISSED** with prejudice in accordance with the directives of the Prison Litigation Reform Act under 28 U.S.C. § 1915A and 28 U.S.C. § 1915(e)(2)(B).

IT IS FURTHER ORDERED that the Report and Recommendation (doc. no. 7) of Magistrate Judge Lenihan dated December 20, 2007, is adopted as the Opinion of the Court.

IT IS FURTHER ORDERED that the Clerk of Court mark this case **CLOSED**.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, Plaintiff has thirty (30) days to file a notice of appeal as provided by Rule 3 of the Federal Rules of Appellate Procedure.

By the Court:

A handwritten signature in black ink, appearing to read "Donetta W. Ambrose", is written over a horizontal line.

Donetta W. Ambrose

United States District Judge, Chief

cc: Lisa Pupo Lenihan
United States Magistrate Judge

James M. Malarik, No. 130218
Allegheny County Jail
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